BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

[redacted]
Charged Employee

and

Office of the Inspector General
United States Agency for International Development

Record of Proceedings
FSGB No. 2012-057

April 27, 2015

ORDER: Motion for Leave to File and to Reopen Discovery
EXCISED

For the Foreign Service Grievance Board:

Presiding Member:	Susan R. Winfield
Board Members:	William J. Hudson Nancy M. Serpa
Special Assistant	Joseph J. Pastic
Representative for the Charged Employee:	Daniel S. Crowley Associate Hannon Law Group
Representative for the Office of the Inspector General:	Lisa Goldfluss Legal Counsel to the Inspector General
Employee Exclusive Representative:	American Foreign Service Association

ORDER: Motion for Leave to File and to Reopen Discovery

I. ISSUE

This order resolves two outstanding issues:

(1) A determination whether anyone in the United States Agency for International Development (USAID) Office of the Inspector General (OIG) currently has authority to prosecute the instant recommendation to separate an OIG employee for cause; and

(2) Requests filed by [redacted] (the charged employee, the employee) for leave to file a Supplemental (Post-Hearing) Memorandum (with the Memorandum attached) and a Motion to Reopen Discovery.

In this order, the Foreign Service Grievance Board (FSGB, Board) finds that the current Acting Deputy Inspector General, Catherine Trujillo, has authority to prosecute the instant claims. The Board also grants the motion for leave to file the Supplemental Memorandum and upon consideration of the memorandum, an opposition and reply, grants the Motion to Reopen Discovery.

II. BACKGROUND

[redacted] is employed by USAID OIG as a financial auditor. In both 2010 and 2011, the charged employee submitted draft audit reports on USAID programs in [redacted] and [redacted]. In these draft reports, the employee disclosed significant mismanagement of the programs and waste of "hundreds of millions of [U.S.] taxpayer dollars." The record does not reveal precisely when the employee submitted her draft audit reports; however, she claims that after she met several times with her Audit Manager, [redacted], and Regional Inspector General, [redacted], the negative findings were redacted and she was subjected to what she alleges was a retaliatory investigation into her financial activities in [redacted]

The investigation revealed that on numerous occasions, the employee submitted to OIG a number of allegedly false vouchers for reimbursement for educational travel expenses, and a number of requests for cost of living allowance (COLA) payments to which she was allegedly not entitled as well as a violation of housing program entitlements.

Based on a review of the Report of Investigation (ROI),[1] the Acting IG, Mr. Michael Carroll, proposed to separate her from employment for cause.[2] After reviewing written and oral replies from [redacted], Mr. Carroll recommended to the Foreign Service Grievance Board (FSGB, Board) in a letter dated August 3, 2012 that the employee be separated for cause. By this date, however, Mr. Carroll's tour as Acting IG had ended and he was again serving as the DIG, while the positions of IG and Acting IG were then vacant.[3]

The Board then inquired of the parties what authority Mr. Carroll had to recommend the employee's separation for cause. After receiving briefs from the USAID/OIG and [redacted] on the viability of the instant separation action, the Board concluded that USAID/OIG did not have authority, through the Deputy Inspector General (DIG), to prosecute this matter and the case was dismissed.

In 2013, while [redacted] motion to be reinstated to her former pay status was pending before this Board, Mr. Carroll was nominated by President Obama to be the IG for USAID. As such, Mr. Carroll again became the Acting IG, pursuant to the Federal Vacancy Reform Act (FVRA). When, as Acting IG, Mr. Carroll ratified his earlier recommendation to separate [redacted]

[1] The parties did not submit a copy of the ROI to the Board either before or at the hearing.

[2] On October 16, 2011, the Inspector General (IG) of USAID retired. The position of USAID IG is Presidentially-appointed, subject to Senate confirmation. After the IG retired, Mr. Michael G. Carroll, the Deputy Inspector General (DIG) and the IG's principal deputy, assumed duties as Acting IG, in accordance with the Federal Vacancy Reform Act (FVRA) of 1998, 5 U.S.C. § 3345, *et seq*. Mr. Carroll held the acting position until May 16, 2012, the statutory limit of 210 days under the FVRA, after which, he resumed his duties as DIG.

[3] [redacted] was immediately placed on leave without pay status with this recommendation.

[redacted] for cause, the Board reinstated the pending case and denied the employee's motion for reinstatement to her former pay status.

The Board held a hearing over several days on the pending recommendation for separation, beginning on July 28, 2014. The parties filed post-hearing briefs in October 2014, after which, as the Board was preparing a final order, we were advised that Mr. Carroll announced in October 2014 that he was withdrawing his name from consideration for the position of IG. The President formally withdrew his nomination of Mr. Carroll from consideration by Congress, on November 12, 2014 and Mr. Carroll retired from the Foreign Service, effective December 31, 2014.

Shortly after the nomination was withdrawn, the charged employee filed the instant motions for leave to file a supplemental memorandum and to reopen discovery on November 14, 2014. In her request for leave to file, the employee asserts that she has discovered "important new facts" after the hearing and after the post-hearing briefs were submitted that she wishes to address in a supplemental post-hearing memorandum. She also seeks to explore issues related to the newly discovered evidence and requests that discovery be reopened. The agency opposes the motion, asserting that there is no new evidence that is relevant to the claims that were previously litigated and, therefore, there is no need to reopen discovery.

On January 20, 2015, the Board asked the parties to brief the question of who, if anyone, retained authority to prosecute the instant separation for cause action on behalf of OIG after the resignation of Mr. Carroll on December 31, 2014. The parties responded to this inquiry as stated below.

III. POSITION OF THE PARTIES

AUTHORITY TO PROSECUTE

USAID/OIG:

OIG advised the Board that on December 31, 2014, before he retired, Mr. Carroll appointed the Deputy Inspector General for Operations, Catherine Trujillo, to the position of Acting Deputy Inspector General and delegated to her "all duties, authorities, responsibilities, powers and discretions of the position of Deputy Inspector General." According to OIG, with this delegation, Ms. Trujillo became the highest ranking member of USAID/OIG.

OIG further advised the Board that on January 15, 2015, the USAID Administrator delegated to the OIG DIG, Catherine Trujillo, authority to recommend separation of any Foreign Service employee of OIG for cause. According to this delegation, the USAID Administrator entrusted to

> the highest ranking official with respect to position held within the Office of Inspector General all statutory authorities otherwise conferred upon the Administrator under the Foreign Service Act, 22 USC §§ 3901, *et seq.*, and regulations and directives promulgated pursuant thereto, to take any action pertaining to the personnel management of the Office of Inspector General's Foreign Service employees.

In her request for this delegation of authority from the USAID Administrator, Ms. Trujillo wrote:

> USAID's Office of Inspector General has, at the present time, neither an Inspector General nor an Acting Inspector General. The highest ranking official by position within OIG is the Acting Deputy Inspector General (also the incumbent for the position of Deputy Inspector General for Operations) to whom all authorities of Deputy Inspector General have been delegated. The delegation sought would confirm that all statutory authorities previously delegated to the Inspector General in the 1996 Delegation remain delegated to the highest ranking official with respect to position within the Office of inspector General.

THE CHARGED EMPLOYEE:

In response to the Board's inquiry and in opposition to the OIG response, the charged employee argues that Mr. Carroll's attempt to delegate his authority to the DIG for Operations, Ms. Trujillo, was ineffective because Mr. Carroll's delegation was made at the same time that he encumbered the position and thereby was a nullity because two persons could not simultaneously exercise the authority of the same position on December 31, 2014. Accordingly, the employee argues, Ms. Trujillo never became the Acting DIG and, therefore was not in a position to request the delegation from the USAID Administrator. Instead, she argues, the Administrator's delegation of authority over OIG Foreign Service personnel must be deemed to confer authority on "the highest ranking official by position within OIG," which, according to the employee, is the Assistant Inspector General for Audit.

The employee also argues that even if Ms. Trujillo is the highest ranking official by position at OIG, she could not have become so before the purported delegation from Mr. Carroll on December 31, 2014. The OIG's oppositions to her motions for leave to file and to reopen discovery, however, were filed on December 12, 2014, when there was no Acting IG and therefore, there was no one on whose behalf this matter was being litigated. Accordingly, she asks the Board to strike from the record the OIG's filings of December 12.

MOTIONS FOR LEAVE TO FILE AND TO REOPEN DISCOVERY:

THE CHARGED EMPLOYEE:

[redacted] initially claimed that these separation proceedings are the result of an intensive and retaliatory investigation into her financial submissions to USAID/OIG based on her efforts to report negative findings of mismanagement and waste in two audit reports that criticized USAID programs in [redacted] and in [redacted]. She states:

> As an affirmative defense to her termination, [the employee] claimed that her attempts to include critical information in audit reports was a contributing factor in her removal. … [The employee] had attempted to report the waste of hundreds of millions of taxpayer dollars in two different audit reports[,] but the OIG resisted, claiming that the matters were outside the scope of the audit and the information never saw the light of day.[4] [In a related footnote, the charged employee notes that she "also filed a whistleblower complaint with the Office of Special Counsel in June 2012."] Shortly thereafter, the OIG began to investigate [the employee] and when [] no facts were uncovered that supported the allegations, the OIG's Special Agent in Charge, [redacted][,] cancelled her travel plans, took over the investigation herself, instructed employees to review every financial document [the employee] ever submitted, and conducted a dozen depositions in as many days.[5]

The charged employee further complains that [redacted], the USAID Regional Inspector General in [redacted] was one of the individuals who allegedly retaliated against her by supporting the investigation into her financial activities in [redacted] She stated: "[T]his investigation is a direct result of the perception held by [redacted] and others, of her as a 'trouble maker' for attempting to disclose this information."

The employee avers that in order to develop evidence of her retaliation defense, she attempted to secure written discovery from the OIG of retaliation claims filed by other employees against USAID/OIG as well as documentation of her efforts to include negative

[4] In the 2010 audit, the charged employee wrote in her draft report that despite receiving 120 million dollars in funding from Congress, management of the HIV/AIDS program was severely inadequate with respect to its procurement, logistical and financial systems. She reported, moreover, that the [redacted] government did not keep track of whether patients were getting drugs at more than one clinic, thereby permitting patients to sell excess drugs on the black market. With regard to the Family Planning program in [redacted] the employee wrote in 2011 that USAID/[redacted] accepted contraceptives for distribution that did not meet the country's medical regulations, resulting in the drugs remaining in storage for more than one year, well past their expiration date and requiring that they be discarded.

[5] [redacted] testified at the hearing that at the time she became involved in this investigation, she was assigned to work in Washington, D.C.; however, she went to [redacted] on temporary duty and took over this investigation when she discovered that "[it] had not progressed."

information in the two audit reports. She asserts that the OIG refused to respond to these discovery requests.[6]

[redacted] recalls that OIG moved to dismiss her retaliation defense during a telephonic prehearing conference (PHC) held between the Board and the parties. The Board deferred ruling on the motion until the start of the hearing; however, we discussed with the employee's counsel whether a retaliation defense would be viable in the absence of evidence that Mr. Carroll had personal knowledge of her protected disclosures. The employee now argues: "Given the Board's requirement that [she] demonstrate that Mr. Carroll had personal knowledge [of her protected disclosures] without deposing any other witness on the issue, Mr. Carroll's own denial left [redacted] with no choice but to withdraw her affirmative defense."[7]

[redacted] also challenges a ruling by the Board during the PHC granting OIG's motion to strike the scheduled depositions of Special Agent [redacted], who was initially assigned to investigate her, and her Audit Manager, [redacted], who redacted both of her audit reports, on grounds that their testimony pertained "only to the alleged retaliatory reasons why [the employee] was investigated." She contests the Board's conclusion that the reasons for initiating the investigation were irrelevant to proving the charged offenses or the retaliation defense.

Lastly, the employee argues that according to the newspaper articles about Mr. Carroll, "many other auditors … complained of pressure to remove critical findings in audit reports and feared retribution from [him]." In addition, she claims that Senator Thomas Coburn made

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[6] At the same time, the employee agrees that OIG identified one employee other than herself who alleged retaliation that was unrelated to a claim of altered reports and that OIG produced "some of the requested audit files."

[7] The employee concedes that in his later deposition, Mr. Carroll denied having any knowledge of her purported protected activities – that is, her efforts to include negative information about waste and mismanagement in two audit reports in [redacted]. In fact, Mr. Carroll testified in his deposition that finalization of audits was a "decentralized" function of Regional Inspectors General and that as the Acting IG in Washington, D.C. he had nothing to do with those decisions.

findings that Mr. Carroll pressured auditors to remove critical information from audit reports. She contends:

> These revelations, substantiated by Mr. Carroll's withdrawal from consideration for the [IG] position, suggest that the OIG's discovery responses omitted critical information about whistleblowers like [redacted] For this reason, [she] asks the Board to reopen discovery and permit her to take full discovery on her retaliation claim.

USAID/OIG:

OIG argues in opposition to the motions for leave to file, to reopen discovery and in opposition to the supplemental memorandum, that there is no new evidence. Instead, OIG contends, [redacted] seeks to reopen the case after it has been fully litigated based on unproved and anonymous accusations contained in one newspaper article.[8] OIG states:

> [The charged employee's] attempt to paralyze the Board in rendering a final decision after three years of litigation, based on rank speculation arising from a newspaper article predicated primarily on unnamed sources and hearsay lacking any indicia of reliability, along with partisan rhetoric from agenda-driven politicians, is irresponsible, exploitative, obstructionist and patently unjust.

The OIG further argues that there is no evidence that Mr. Carroll pressured anyone to sanitize or remove negative findings from audit reports. It claims that there was a year-long investigation conducted by the Council of Inspectors General on Integrity and Efficiency (CIGIE) that found the allegations against Mr. Carroll to be unsubstantiated.

In addition, the OIG maintains that there is no nexus between the allegations made in the newspaper article against Mr. Carroll (that he allegedly made changes to three audit reports that were unfavorable to USAID) and any of this charged employee's work assignments. That is,

[8] Initially, in her supplemental memorandum, the charged employee referenced one newspaper article about Mr. Carroll and accusations lodged against him by Senator Thomas Coburn. In her rebuttal submission, however, the employee referenced a second article about Mr. Carroll that accused him of similar misconduct and a letter to the editor from a former USAID/OIG employee who accused Mr. Carroll's chief of staff of repressing negative findings in one audit report that, according to the employee, "shouldn't have been removed."

OIG asserts that this employee was not involved in any of the three reportedly altered audits that were mentioned in the news article. Thus, whatever complaints she has, or had, about changes made to two of her audit reports, are unrelated to the accusations made against Mr. Carroll. And conversely, the accusations against Mr. Carroll, as Acting IG in Washington, D.C., are irrelevant to her audit work in [redacted]

The OIG also states that no employee, other than this charged employee, has filed a retaliation claim against Mr. Carroll or USAID/OIG and this fact was fully disclosed to the employee during discovery. The OIG also argues that after discovery was completed in this matter, [redacted] "explicitly, intentionally and voluntarily" withdrew her retaliation claim, both in a written stipulation submitted prior to the hearing and on the record at the outset of the hearing.

In addition, the OIG argues that the charged employee has already filed a whistleblower retaliation claim in the only appropriate forum – the Office of Special Counsel – in which she made the very allegations that she seeks to raise here. OIG reports that OSC investigated these claims and did not find retaliation.[9]

Finally, in response to the charged employee's assertion that Mr. Carroll's withdrawal from consideration for the IG position substantiates the allegations in the news article, the OIG states: "This is not evidence; it is red journalism run amuck …."

IV. DISCUSSION AND FINDINGS

A. AUTHORITY TO LITIGATE

In the instant matter, the Board inquired whether anyone at USAID/OIG had authority to litigate this matter after Mr. Carroll withdrew his name from consideration for the position of IG

[9] The parties did not submit to this Board the findings made by the OSC on the employee's whistleblower claims.

on November 12, 2014. Based on the information provided by the parties, we conclude that effective January 15, 2015, Ms. Trujillo became the employee at OIG to whom the USAID Administrator specifically delegated authority to prosecute a separation for cause action on behalf of USAID/OIG. As we stated in an earlier order, we conclude that under the FVRA, in the absence of both the IG and an Acting IG, which was the situation on November 12, 2014 after the President withdrew his nomination of Mr. Carroll for the position of IG, the authority to separate an OIG Foreign Service employee for cause reverted to the USAID Administrator, or his designee. (See our order, dated March 27, 2013 at 9-15).

We find, after reviewing the evidence submitted by the OIG, that when Mr. Carroll was no longer the nominee, he was no longer the Acting IG and the authority to separate [redacted] reverted to the USAID Administrator. At the same time, we recognize that on January 15, 2015, the Administrator delegated his authority to separate OIG employees for cause to Catherine Trujillo, by name and by both of her titles – Acting DIG and DIG for Operations. Whether or not she in fact became the Acting DIG by means of the delegation from Mr. Carroll on December 31, 2014, she certainly was the intended employee to whom the Administrator delegated authority to prosecute the instant case. Based on our review of the FVRA, this delegation was both permissible and properly accomplished. Accordingly, we do not require an express ratification of the OIG pleadings that were filed between November 12 and January 15, 2015 to be satisfied that OIG counsel is litigating this matter on behalf of an individual with duly delegated authority to proceed. The charged employee's request that we strike the pleadings filed between November 12, 2014 and January 15, 2015 is denied.

B. LEAVE TO FILE AND TO REOPEN DISCOVERY

In order to decide the motion for leave to file the supplemental memorandum, we reviewed the supplemental memorandum, as did OIG. Accordingly, we grant the request for leave to file the supplemental memorandum and upon reviewing it, along with the opposition filed by USAID/OIG and the reply, we conclude that the motion to reopen discovery should be granted for the reasons stated below.

The charged employee asks to reopen discovery on several grounds: She claims that statements made in news articles about Michael Carroll prove that she was not given all of her requested discovery. She also states that Mr. Carroll's withdrawal from consideration to be the IG for USAID substantiates the allegations that he improperly interfered with OIG audit reports and "*suggest*[s] that the OIG's discovery responses omitted critical information about whistleblowers like [her]." (Emphasis added.) She asks to reopen discovery to explore whether there is any evidence that Mr. Carroll pressured employees to remove critical findings in their audit reports and whether he retaliated against those who resisted this pressure.

The charged employee also claims that she is entitled to further discovery to support her whistleblower retaliation defense based on these articles. She notes the two depositions that the Board did not permit her to take on the ground that the reason for opening the investigation was considered to be irrelevant. She also argues that the Board left her with "no option" other than to withdraw her retaliation defense prior to the hearing because she was required to establish that Mr. Carroll had personal knowledge of her protected activities, which she was unable to do. She claims that allowing her to take additional discovery will allow her to develop her whistleblower retaliation defense to the charges.

1. OIG Responded Fully to All Requested Discovery

We first find that [redacted] has not established that, with the exception of the two depositions of Messrs. [redacted] and [redacted] she was denied any of her requested discovery.[10] Despite her empty claim that OIG did not fully respond to her discovery requests, the Record of Proceedings (ROP) reveals that OIG produced more than 4500 pages of documents and 5 hours of audio tape in response to her discovery requests. Moreover, in its discovery responses, OIG disclosed that there was one employee who alleged retaliation, albeit unrelated to audit findings, and OIG disclosed some of the charged employee's audit files as requested. We observe that after receiving discovery from OIG, the charged employee did not file a motion to compel additional discovery prior to the close of discovery or at any time prior to the hearing. After the PHC and after discussing the discovery issues with counsel for both parties, the Board wrote:

> All discovery is complete, except for depositions and one document request. … [Employee's counsel] said that there is some unanswered discovery, which he will review and submit to [OIG counsel] by close of business on May 7 for resolution. [The charged employee] may file a motion to compel discovery if mutual efforts are not successful. Such motion, if filed, should address the issue of timeliness and, if timely, will be addressed by means of a status conference for prompt resolution.

As we stated, the charged employee did not file a motion to compel. We therefore conclude that her claim that OIG did not respond to her discovery requests fully lacks merit.

2. There Is No New Evidence in the News Articles

The instant request to reopen discovery is also grounded in part on the charged employee's claim that she has newly discovered evidence consisting of anonymous allegations about Mr. Carroll's alleged improper influence on OIG audits of USAID programs. Under

[10] We note that according to our prehearing conference order, [redacted] was scheduled to be deposed on May 12, 2014; [redacted] was scheduled for deposition on May 28th, and Mr. Carroll was scheduled on June 4th.

applicable statutes, regulations and procedures, we acknowledge that "the Board may reconsider any decision upon presentation of newly discovered or previously unavailable material evidence."[11] The burden of proof is on the employee to establish that her motion is meritorious.

We find nothing in the news articles that supports the employee's claim that there is new evidence relevant to the instant case. In our view, the employee, through counsel, engages in pure speculation when she contends that there must be additional witnesses and evidence that were not disclosed by OIG that would support a claim that Mr. Carroll engaged in pressuring employees to sanitize their audits and retaliated against those who resisted. We further find that the allegations about Mr. Carroll have nothing to do with [redacted]. She does not allege that Mr. Carroll was in any way involved with the redaction of her audit reports of 2010 and 2011. Nor does she allege that he was at all involved with the initiation of the investigation into her financial submissions after her audit reports were revised. Accordingly, we conclude that unproved statements in news articles about Mr. Carroll's alleged interference with audit reports in three instances that did not involve this employee do not create new evidence and, in any event, are irrelevant to her retaliation defense to the charges lodged against her. We find this conclusion especially compelling given that the Mr. Carroll's actions, vis-à-vis audit reports, were reportedly investigated for a year by an independent agency and allegations of his wrongdoing were found to be unsubstantiated.[12] We conclude, therefore, that the newspaper articles provide no basis for additional discovery based on newly discovered evidence.

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[11] *See*, Section 1106(9) of the Foreign Service Act, 22 U.S.C. § 4136(9) and 22 CFR § 910.1.

[12] The charged employee does not dispute OIG's claim that the accusations about Mr. Carroll were investigated and were not substantiated. Moreover, we find speculative her suggestion that Mr. Carroll's withdrawal from consideration to be the IG and his resignation from USAID/OIG is a basis for any conclusion about the accuracy of the accusations against him. We also note that the charged employee does not dispute OIG's assertion that Senator Coburn's concerns did not result in any findings against Mr. Carroll.

3. The Whistleblower Retaliation Defense

In order to prove a whistleblower retaliation defense under the Whistleblower Protection Act (WPA), a federal agency employee must make non-frivolous allegations that:

(a) s/he made a protected disclosure;
(b) thereafter, her employer made a personnel decision; and
(c) the protected disclosure was a contributing factor in the personnel decision.[13]

If these allegations are proved by preponderant evidence, then the employer has the burden of proving by clear and convincing evidence that it would have taken the same personnel action(s) against the employee in the absence of the disclosure. *Whitmore v. Department of Labor*, 680 F.3d 1353 (Fed. Cir. 2012); *Carr v. Social Security Administration*, 185 F.3d 1318 (Fed. Cir. 1999).[14]

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[13] The WPA provides:

> … (b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority--
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> * * *
>
> (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—
>
> (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—
>
> (i) any violation of any law, rule, or regulation, or
>
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or
>
> (B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—
>
> (i) any violation (other than a violation of this section) of any law, rule, or regulation, or
>
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

5 U.S.C. § 2302(b)(8).

[14] In *Carr, supra*, the Court established three factors to be considered when deciding whether the employer has met its burden of proof by clear and convincing evidence. These factors include: [1] the strength of the agency's evidence in support of its personnel action; [2] the existence and strength of any motive to retaliate on the part of the

A review of applicable case law reveals that disclosures in an audit report during routine job duties can qualify for protection under the WPA, as amended by the Whistleblower Protection Enhancement Act (WPEA) of 2012.[15] Accordingly, the charged employee's audit disclosures in 2010 and 2011 might qualify for protection under the WPEA because she disclosed in the draft reports to her managers gross waste of U.S. Treasury funds by programs managed by USAID. See for example, *Garrett v Department of Defense,* 62 MSPR 666, 671 (1994) (An auditor's disclosures in an audit report about mismanagement of contract funds by a contractor were intended to be protected under the WPA.) There is also some authority for the position that a disclosure is protected even if it reveals mismanagement by a contract partner. *See*, *Arauz v Department of Justice*, 89 MSPR 529, 540 (2001), mod. on other grounds, 93 MSPR 166 (2002). (An employee's disclosures about a private organization's wrongdoing were protected under [the WPA] because the wrongdoing occurred in the operation of a government program, thereby implicating the government's interests and "good name" and because the agency was in a position to influence and oversee the organization's performance of its functions.)[16]

With respect to the second element of a whistleblower retaliation defense, [redacted] would have to establish that OIG took a "personnel action" against her. In this instance, she cites

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agency officials who were involved in the [personnel] decision; and [3] any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *Id.* at 1323.

[15] See section (f)(1): "A disclosure shall not be excluded from subsection (b)(8) because— (A) the disclosure was made to a supervisor or to a person who participated in an activity that the employee or applicant reasonably believed to be covered by subsection (b)(8)(A)(i) and (ii) ….

[16] See also, *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999) (The test for determining whether a disclosure is protected by [the WPA] is whether "a disinterested observer … [could] reasonably conclude that the actions of the government evidence" a kind of wrongdoing covered in that provision), *cert. denied*, 120 S. Ct. 1157 (2000).

as retaliatory, both the extensive investigation into her financial submissions and the resultant proposal and recommendation to remove her.[17] We note that the WPA does not list an investigation among the cited personnel actions that can be challenged in a whistleblower retaliation defense.[18] However, in several cases, the Merit Systems Protection Board (MSPB) has found that an investigation can, in some circumstances, be a challenged personnel action in a whistleblower retaliation defense. *See Johnson v. Department of Justice,* 104 MSPR 624 at 7 (2007) ("[T]he [MSPB] will consider evidence of the conduct of an agency investigation when it is so closely related to a personnel action that it could have been pretext for gathering evidence to use to retaliate against an employee for whistleblowing.") *Accord, Russell v. Department of Justice,* 76 MSPR 317, 322 (1997); *Geyer v. Department of Justice,* 70 MSPR 682, 688-689, aff'd, No. 96-3328 (Fed. Cir. 1997); *Mongird v. Department of the Navy,* 33 MSPR 504, 507 (1987). The proposal and recommendation to separate the employee for cause is expressly included in the WPA as a potentially disputed personnel action.

4. Knowledge of the Decision Maker

In order for the employee to prove that her protected disclosure contributed to the personnel action, she would have to prove that the decision maker had knowledge (either actual

[17] The charged employee wrote in her OSC disclosure: "As a result of [her] effort to contemporaneously disclose this [audit] information [about gross mismanagement of U.S. funds], she became the subject of retaliatory conduct by OIG." She identifies [redacted], the USAID Regional Inspector General in [redacted] as the individual who allegedly retaliated against her by initiating an investigation into the employee's financial activities in [redacted]. The disclosure further states: '[redacted] believes this investigation is a direct result of the perception held by [redacted] and others, of her as a 'trouble maker' for attempting to disclose this information."

[18] According to 5 USC § 2302(a)(2), a personnel action, for purposes of the WPA, includes an appointment; promotion; suspension; detail, transfer or reassignment, reinstatement; restoration; re-employment; performance evaluation; a decision regarding pay, benefits, awards or certain types of training; an order to undergo a psychiatric examination; implementation or enforcement of a nondisclosure policy; or any other "significant change in duties, responsibilities, or working conditions."

or constructive/imputed) of her protected activities. In *Whitmore, supra,* the Court of Appeals explained the knowledge component to a whistleblower retaliation defense:

> … When a whistleblower makes [a] highly critical accusation[] of an agency's conduct, an agency official's merely being outside that whistleblower's chain of command, not directly involved in alleged retaliatory actions, and not personally named in the whistleblower's disclosure is insufficient to remove the possibility of a retaliatory motive or retaliatory influence on the whistleblower's treatment. Since direct evidence of a proposing or deciding official's retaliatory motive is typically unavailable (because such motive is almost always denied), federal employees are entitled to rely on circumstantial evidence to prove a motive to retaliate. (Citation omitted.) Thus, "[w]hen applying the second *Carr* factor, the [Merit Systems Protection] Board will consider any motive to retaliate on the part of the agency official who ordered the action, as well as any motive to retaliate on the part of other agency officials who influenced the decision.

Id. 680 F.3d at 1371.

The charged employee states that Mr. Carroll denied any actual knowledge of her protected disclosures and, therefore, based on the Board's ruling, she withdrew her retaliation defense before the hearing. The pertinent cases, however, provide that actual knowledge by the decision maker is not the only basis for proving retaliation. As explained in *Whitmore, supra,* even where there is no evidence that the decision maker had direct knowledge of an employee's protected activities when proposing employment discipline and, therefore, where there was no direct evidence that the decision maker had a retaliatory motive, such a motive may be imputed to him if there is evidence that someone else with a retaliatory motive influenced the discipline decision with knowledge of the protected activity.

In *Russell, supra,* the MSPB discussed the impact of a retaliatory investigation on a whistleblower's ability to prove constructive knowledge and imputed retaliatory animus of an otherwise neutral decision maker. In *Russell,* a whistleblower disclosed misconduct by two of his superiors, after which, one of the superiors initiated an investigation of the whistleblower's

conduct, resulting in disciplinary charges against the whistleblower. The MSPB held that no charges against the whistleblower could be sustained in the absence of proof by the agency that the investigation was not retaliatory, that is, that the investigation would have occurred absent the protected disclosure. The MSPB explained the "retaliation by investigation" whistleblower defense:

> … [E]ven if the deciding official did not have actual knowledge of the [protected] disclosure, we would find [on the facts of the case] that imputed knowledge impermissibly influenced his decision. *Cf. Marchese v. Department of the Navy*, 65 M.S.P.R. 104, 108-09 (1994) ([A]n appellant may establish constructive knowledge by demonstrating that an individual with actual knowledge of the disclosure influenced the official accused of taking a retaliatory action.) A whistleblower *need not* demonstrate the existence of a retaliatory motive on the part of the employee taking the alleged prohibited action in order to establish that his disclosure was a contributing factor to the personnel action. *See Marano v. Department of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993).
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> That [an] investigation [into a whistleblower's conduct] itself is conducted in a fair and impartial manner, or that certain acts of misconduct are discovered during the investigation, does not relieve an agency of its obligation to demonstrate by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure. *See* 5 USC § 1221(e)(2).
>
> To here hold otherwise would sanction the use of a purely retaliatory tool, selective investigations. Congress included protection for whistleblowers … to assure federal employees that "they will not suffer if they help uncover and correct administrative abuses." (Citation omitted). … So long as a protected disclosure is a contributing factor to a contested personnel action, and the agency cannot prove its affirmative defense, *no harm* can come to the whistleblower." (Citation omitted). Thus an agency's selective use of investigations, i.e., its choice to investigate a whistleblower, because of his or her status as a whistleblower, would contravene this goal.

Russell v. DOJ, supra, 76 MSPR at 3-5. (Emphasis in original.) See also, *Johnson v. DOJ, supra*, 104 MSPR at p 7; *Geyer, supra*, 70 MSPR at 689.

Applying this analysis to the instant case, we acknowledge that proof of a whistleblower retaliation defense is not restricted to proof that Mr. Carroll had personal knowledge of the

charged employee's protected disclosures. Instead, the issue is whether there is evidence that Mr. Carroll had constructive knowledge of the protected disclosures and whether a retaliatory motive of anyone who initiated or conducted the investigation should be imputed to him. In order to explore these issues, we conclude that the employee should have been permitted to depose Messrs. [redacted] and [redacted] to examine whether anyone had knowledge of her audit disclosures and thereafter initiated or influenced a retaliatory investigation that led to the removal recommendation. If the charged employee is able to establish this constructive knowledge and imputed retaliatory motive on the part of Mr. Carroll, she would be able to argue that her disclosures contributed to the separation action and the OIG would bear the burden of proving that it would have taken the same action to investigate and separate her in the absence of her disclosures.

5. Limitations on Reopened Discovery

We conclude that the charged employee is entitled to seek additional discovery from Messrs. [redacted] and [redacted] but that she may not seek any additional discovery from any other witness in the absence of a justification for not seeking the additional discovery within the prehearing schedule set by our Board Policies and Procedures. Depending on the results of her limited additional discovery, the employee should advise this Board within 30 days whether she seeks to reinstate and litigate her whistleblower retaliation defense.[19] If she does, the Board will resume the hearing to allow her to present her evidence and to permit the OIG to offer responsive evidence. If the employee elects not to depose the two witnesses or declines to present a

[19] Given the colloquy with the parties at the prehearing conference, we are not persuaded by the argument advanced by the OIG that the charged employee voluntarily withdrew her retaliation defense prior to and at the start of the hearing. We accept the employee's assertions that her decision to withdraw the retaliation defense was a direct result of our ruling that the defense was not available without proof that Mr. Carroll had personal knowledge of her protected disclosures.

retaliation defense, she should so notify the Board within 30 days of receipt of this order and we will issue a final decision on the charges based on the evidence adduced at the hearing.

V. DECISION

1. The charged employee's motion to strike the OIG pleadings filed on December 12, 2014 is denied.

2. The charged employee's motion to file a supplemental memorandum is granted. The Board accepts the memorandum as filed on November 14, 2014.

3. The charged employee's motion for leave to reopen discovery is granted. The employee may schedule depositions of [redacted] and [redacted] immediately. No additional discovery may be taken absent a request for same with good cause shown.

4. The charged employee shall advise the Board within thirty days of receipt of this order if she has taken the additional depositions and whether or not she has, whether she wishes to present evidence in support of her whistleblower retaliation defense to the charges.

For the Foreign Service Grievance Board:

[redacted]
Susan R. Winfield
Presiding Member

[redacted]
William Hudson
Member

[redacted]
Nancy M. Serpa
Member